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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7

8 MICHAEL JOHN MOE,

9 Petitioner,

3:14-cv-00410-RCJ-WGC

10 vs.

ORDER

11 BRIAN E. WILLIAMS, SR., *et al.*,

12 Respondents.
13 _____/

14
15 In this habeas corpus action, brought *pro se* by Nevada prisoner Michael John Moe, the court
16 ruled on June 25, 2015, on a motion to dismiss filed by the respondents, and in that order found the
17 following claims in Moe's habeas petition to be unexhausted in state court:

18 Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 (except to the
19 extent based on trial counsel's alleged failure to investigate witnesses Donnelly,
20 Duncan and Catron), 21, 22, 23, 24(2) (except to the extent based on trial counsel's
21 alleged failure to call Pam Metzger to testify), 24(3) (except to the extent based on
22 trial counsel's alleged failure to encourage Moe to testify at trial), 24(4), 24(5), 24(6),
23 24(7), 24(8), 24(9) (except to the extent based on trial counsel's alleged failure to
24 investigate witnesses Donnelly, Duncan and Catron), 24(10), 24(11), 24(12), 24(13),
25 24(14), 24(15), 24(16) (except to the extent based on trial counsel's alleged failure to
26 offer at trial, as evidence, "the advertisement flyer showing sale jackets from Cabela's
store and [the receipt from] Metzger's gambling tournament at Boomtown"), 24(17),
24(18), 24(19), 24(20), 24(21) (except to the extent based on trial counsel's alleged
failure to "investigate the prosecutor's hearsay remarks regarding Game Stop
contacting Cabela's about Pam Metzger selling videotapes stolen by Moe"), 24(22)
(except to the extent based on trial counsel's alleged failure to object to "the
prosecutor's hearsay remarks regarding Game Stop contacting Cabela's about Pam
Metzger selling videotapes stolen by Moe," and to offer evidence that one of his prior
convictions was the result of a trial at which he was not present), 24(23) (except to the
extent based on trial counsel's alleged failure to object to "the prosecutor's hearsay

1 remarks regarding Game Stop contacting Cabela's about Pam Metger selling
 2 videotapes stolen by Moe"), 24(24) (except to the extent based on trial counsel's
 3 alleged failure to object to "the prosecutor's hearsay remarks regarding Game Stop
 4 contacting Cabela's about Pam Metger selling videotapes stolen by Moe"), 24(25),
 5 24(26) (except to the extent based on trial counsel's alleged failure to object "when
 6 the court ordered there were sixteen minutes left to finish the jury trial after the
 7 State's case"), 24(27), 24(28), 24(29), 24(30), 24(31), Ground 24(32) (except to the
 8 extent based on trial counsel's alleged failure to play "the videotape from Cabela's
 9 security office to impeach Officer David Robertson's supplemental report," and to
 10 cross-examine Donnelly, Duncan, and Catron), 25 (except to the extent of Moe's
 11 exhausted claims), 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,
 12 and 44.

13 *See* Order entered June 25, 2015 (ECF No. 20). With respect to those claims, the court granted Moe
 14 an opportunity to make an election to: (1) file a declaration stating that he wishes to abandon all the
 15 claims found by this court to be unexhausted, (2) file a motion for a stay, requesting that this case be
 16 stayed while he exhausts his unexhausted claims, or (3) file a declaration stating that he wishes to
 17 voluntarily dismiss his entire habeas petition in this case without prejudice. *See id.*

18 On July 30, 2015, Moe filed a motion for stay, requesting a stay of the action, to allow him to
 19 return to state court to exhaust his unexhausted claims (ECF No. 21). The court denied that motion
 20 on December 2, 2015, ruling that Moe did not show good cause for his failure to exhaust his
 21 unexhausted claims in his earlier state-court proceedings. *See* Order entered December 2, 2015
 22 (ECF No. 24). The court then granted Moe an opportunity to file a notice of abandonment of claims,
 23 stating that he wishes to abandon the unexhausted claims. *See id.*; *see also* Order entered January
 24 27, 2016 (ECF No. 27).

25 On March 3, 2016, Moe filed a motion for reconsideration, requesting that the court
 26 reconsider its denial of his motion for stay (ECF No. 28). The court denied that motion in an
 order entered April 12, 2016 (ECF No. 31). In that order, the court granted Moe more time to file a
 notice of abandonment of his unexhausted claims.

On May 18, 2016, Moe filed a motion to dismiss the claims found by the court to be
 unexhausted (ECF No. 32). The court granted that motion on June 28, 2016, and dismissed Moe's
 unexhausted claims. *See* Order entered June 28, 2016 (ECF No. 35).

1 Also on May 18, 2016, Moe filed a motion for leave to amend his habeas petition, stating that
2 he wished to amend to clarify his exhausted claims (ECF No. 33). On May 31, 2016, respondents
3 filed a response to Moe's motion for leave to amend, pointing out that Moe did not submit, with his
4 motion, his proposed amended petition, as required by Local Rule LR 15-1(a). In its June 28, 2016,
5 order, the court set a schedule for petitioner to file his proposed amended petition, for respondents to
6 further respond to the motion for leave to amend, and for Moe to reply. Moe filed his proposed first
7 amended petition on September 30, 2016 (ECF No. 38). Respondents then, on October 6, 2016,
8 filed a further opposition to Moe's motion for leave to amend (ECF No. 39). Moe replied on
9 October 31, 2016 (ECF No. 40). Therefore, the motion for leave to amend is now fully briefed and
10 before the court.

11 Moe's proposed amended petition is improper in that it is incomplete in and of itself, and
12 depends on reference to, and incorporation of, material in his original petition. *See* LR 15-1(a)
13 ("The proposed amended pleading must be complete in and of itself without reference to the
14 superseded pleading....").


15 Also, it is apparent from the proposed amended petition, and from Moe's argument regarding
16 it, that amendment is unnecessary. As Moe acknowledges in his reply in support of his motion for
17 leave to amend, "Petitioner makes no attempt to change any claims." Reply in Support of Motion for
18 Leave to Amend (ECF No. 40), p. 2. Rather, Moe seeks "only to clarify and supply the supporting
19 facts and evidence to Petitioner's claims that were deemed exhausted by this Court." *Id.* The
20 proposed amended petition filed by Moe is in the nature of a memorandum of argument in support of
21 his exhausted claims. Moe need not amend his petition in order to proffer such argument.

22 The court will deny Moe's motion for leave to amend his habeas petition. However, the
23 court will consider the argument made in Moe's proposed amended petition (ECF No. 38), with
24 respect to the merits of his exhausted claims.

25 Further, the court will now set a schedule for respondents to file an answer responding to
26 Moe's exhausted claims, and for Moe to reply.

IT IS FURTHER ORDERED that the court will treat Moe's proposed amended petition (ECF No. 38) as argument in support of the exhausted claims in his habeas petition, and will consider that argument with regard to the merits of those claims.

Dated this 12th day of December, 2016.


UNITED STATES DISTRICT JUDGE